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No. 90-1059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—against—

RONALD ZWEIBEL, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELIS PETROMELIS, individually and in their capacities as members of the New York State Crime Victims Board,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONER, SIMON & SCHUSTER, INC.

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PRELIMINARY STATEMENT

The Association of American Publishers, Inc. ("AAP") submits this brief, *amicus curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of Petitioner Simon & Schuster, Inc. ("Simon & Schuster"), seeking reversal of a 2-to-1 decision of the Court of Appeals for the Second Circuit upholding against constitutional attack

Section 632-a of the New York Executive Law, New York's "Son of Sam" law.[1]

THE AMICUS

AAP, a not-for-profit trade association organized under the laws of the State of New York, is the major national association of book publishers in the United States. AAP's more than 200 members include most of the leading commercial book publishers in the United States, as well as many smaller and non-profit publishers, university presses and scholarly associations.[2] AAP's members publish works which run the gamut of published materials, including non-fiction, biography, history and fiction.

INTEREST OF THE AMICUS AND SUMMARY OF THE ARGUMENT

AAP submits this brief in order to express the views of its members concerning the adverse impact that an affirmance of the Second Circuit's decision in this case would have upon the creation and vitality of works of authorship published by AAP's members. Among the wide range of general and educational books produced by AAP members are diverse works dealing with the subject of crime. Such works comprehend fact and fiction, span disciplines such as history, sociology, psychology and criminology, and occupy the talents of often distinguished scholars, biographers, journalists, novelists and other authors. Countless additional works published by AAP members on subjects other than crime in some manner touch

1 The parties' written consents to the filing of this brief are being submitted herewith to be lodged with the Clerk of the Court.

2 While Simon & Schuster is a member of AAP, this brief is motivated by the concerns of AAP's members generally as to the adverse impact of Section 632-a of the New York Executive Law upon book publishers and upon the rights guaranteed by the First and Fourteenth Amendments.

upon that topic, as a minor but relevant portion of the works. As we discuss below, the New York statute here under review would contract the publication of such types of works—in contravention of basic First Amendment doctrine.

Simon & Schuster, one of the nation's leading book publishers, urged below that the statutory provisions here in issue, by severely curtailing its and other publishers' ability to publish works dealing with crime, violate the First and Fourteenth Amendments to the United States Constitution. The majority opinion of the Second Circuit did not dispute the inhibiting effect of the statute, but nevertheless upheld it, based upon its asserted furtherance of a compelling state interest in not rewarding criminals for their "exploitation" of their crimes so long as their victims "are in need of compensation by reason of their victimization." (13a)[3] While the majority purported to apply "strict scrutiny" to a statute that admittedly burdens speech directly and targets speech of specific content (11a-13a), as Judge Newman's dissenting opinion elucidates, the searching inquiry necessitated to uphold such suspect regulation simply was not undertaken. (19a)

It is of particular importance to AAP's members that the decision below be reversed. New York is the center of the nation's publishing industry, and home to many of AAP's members. The legislatures of other states have patterned similar "Son of Sam" laws based on New York's "model." The Second Circuit's ruling in this case, if left undisturbed, will not only adversely affect publishing activities subject to the New York statute, but likely will have the effect of legitimizing more than 30 similar statutes in other states. *See* 59a-60a. The result will be to multiply manyfold the "chilling" effect on publication exacted by the New York law.

Moreover, the Second Circuit's facile and unanalytic approach to the "strict scrutiny" standard, unquestionably called for in reviewing a statute that concededly imposes a

3 Appendix references are to the appendix to the petition for a writ of certiorari.

direct burden on free expression, threatens to erode core First Amendment protections and itself mandates reversal by this Court.

The censorial impact of New York's Son of Sam law is stark and uncontested. The broad deleterious consequences for book publishers of the ruling below sustaining that law prompts this *amicus* filing.

ARGUMENT

A. THE STATUTE IMPEDES THE CREATION OF IMPORTANT WORKS OF AUTHORSHIP.

Section 632-a of the New York Executive Law (herein the "statute" or "Son of Sam" law), which prohibits a publisher from paying monies to an accused or convicted criminal with respect to a work which "reenacts" a crime or conveys that individual's "thoughts, feelings, opinions or emotions regarding such crime" (or from paying any individual who "voluntarily admits" to a crime in his or her writings), and instead requires the publisher to submit such monies to the State to be placed in an escrow fund for five years (55a), poses a direct threat to the creation and vitality of a wide variety of works. The record unequivocally supports this conclusion and the Second Circuit did not dispute it.

Crime has always been a subject of public interest and fascination, and writings about crime are a staple of our literary heritage. It is a core function of the First Amendment to enhance the public's knowledge on matters of public moment—to promote debate and guide our leaders to proper decisions. The statute here in issue—after which similar such statutes in many other states are patterned—would contract that debate, to society's detriment, by limiting the creation of works dealing with crime.

The reach of New York's Son of Sam law is nothing short of astonishing. The withholding of monies applies equally to *accused* and convicted criminals; to the "admi[ssion]" of

crime in a writing; and to the most minor allusion to criminal activity in a work otherwise wholly devoted to other subjects.

As illustrated by the partial listing of works in the Appendix from Bruce Franklin's *Prison Literature in America*, published by Oxford University Press in 1989, attached hereto as AMICUS APPENDIX, the scope of works potentially interdicted by such statutes is breathtaking. This compendium, moreover, only includes works published by convicted criminals—not individuals accused of crimes or who have merely alluded to criminal activity in their works. While this listing likely includes works which would not have implicated Son of Sam statutes, many undoubtedly would have. This compilation bears witness to the number and types of works conceivably impacted by Son of Sam statutes such as that of New York.

Hundreds of American convicts have published accounts of their crimes or have contributed their stories to works written by other persons. These accounts, which describe and help us to understand criminal behavior in our culture, appear in an extraordinary range of works—including personal journals and diaries, poems, magazine articles, short stories, personal narratives, plays and novels. The sheer volume of works of this kind is in great part reflective of the public's curiosity—and, more than that, society's demand to *know*. Yet, many of these works would have been subject to the Son of Sam laws if such laws were in effect at the time they were published. The result would have been that many of these widely-read works would never have been published, at an incalculable loss to the reading public.

Wiseguy, published by Simon & Schuster and the immediate impetus for this constitutional challenge, illustrates a genre of works directly exploring the workings of organized crime. Other such works of historical importance include Jean Genet's *A Thief's Journal*, Henry David Thoreau's *On Civil Disobedience*, Eldridge Cleaver's *Soul on Ice* and Martin Luther King, Jr.'s *Where Do We Go From Here?* The popularity of many such works is unquestioned, as is their

contribution to the public's understanding of the criminal underworld.

Many additional works have centered on the lives of notorious criminals, exploring the roots of their criminal careers, and attempting to delve into the criminal mind. Still other works recount accused or convicted criminals' experiences with the criminal justice system, a system which, as the New York Times recently reported, incarcerates more people than any other in the world. N.Y. Times, Jan. 7, 1991 at 14, col. 1. Some of these works have been directed to the general reading public, others to academic, professional and penological audiences.

Countless works whose focus is *not* on crime nevertheless recount "admissions" of prior criminal activity. For example, numerous biographies and autobiographies depict youthful transgressions, acts of petty larceny, use of illegal drugs, and the like. Rarely are such accounts central to the works; they do, however, present a fuller picture of the biographee's background, character, and human frailties.

Works falling in each of the foregoing categories are regularly published by AAP's members. Depending, in any given instance, upon whether a particular publisher determines that the viability and/or vitality of the publishing project calls for authorship by, or collaboration with, an accused or convicted criminal within the meaning of the statute, prospective works within these categories may never be published or, if published, may be radically altered as to content. This is the direct result of the workings of the statute here under challenge. Such result serves to invalidate a principle this Court has always fought to protect—"that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley* v. *National Federation of the Blind of N.C.*, 487 U.S. 781, 801 (1988).

The statute commands that proceeds, such as a royalty advance, to an accused or convicted criminal (defined to include merely one who voluntarily "admits" to a crime in

the writing (57a)) be withheld and instead transmitted to the New York Crime Victims Board to be held in escrow for five years for the benefit of possible victims. The majority opinion below acknowledged that this statutory scheme has the effect of forestalling publishing projects since, "[w]ithout a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write." (11a).[4] The record also reveals that, even where publication plans proceed, concern over entanglement with the statute will often lead to editorial alterations unrelated to the merits of the publishing project, a form of self-censorship motivated solely by the costs, burdens, and administrative scheme of the statute. Joint Appendix at A13-A47.

The untoward effects of the statute are exacerbated by the fact that all manner of criminal activity comes within its purview—non-violent as well as violent, misdemeanors as well as felonies, federal as well as state, and, indeed, crimes as to which there may not even be any foreseeable victim. Crimes of conscience (*e.g.*, civil disobedience or draft resistance) are treated on the same plane as crimes of wanton violence; admitting to having smoked marijuana triggers the same statutory response as having been convicted for a kidnapping.

Without compelling rationale, the statute would extract from AAP's member publishers (and therefore from the reading public) an extraordinarily high—and in *amicus*' view, a constitutionally impermissible—price. With respect to a wide range of works dealing (whether preponderantly or fleetingly) with a "reenactment" of, or "thoughts, feelings,

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4 The record abounds with evidence that the statute has cast a pall over numerous publishing projects. Affidavits submitted by authors, publishers, and editors detail the numerous publishing projects which prominent publishing houses have determined not to pursue because of concerns over entanglement with the statute, and several which a prominent author, Nicholas Pileggi, has declined to pursue on that same basis. Joint Appendix at A13-A47. AAP's members could recite many additional examples of the impact of the statute on publishing projects.

opinions or emotions" concerning a crime, the State of New York—along with over 30 other states—has supplanted its judgment as to publishing suitability for that of authors, editors and publishers, and consequently has interfered with "expression that the First Amendment was meant to protect." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776.

Precisely this sort of interference with the publishing process has long been viewed as impermissible under the First Amendment. *See Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) ("[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment"). The deleterious effects of a law which intrudes upon editorial decision-making and leads to author, publisher and literary agent determinations that broad categories of works are not publishable are obvious.

The consequential impact of New York's Son of Sam law and its progeny in other states upon the First Amendment rights of AAP's members and others similarly affected warrants the application of strict scrutiny and reversal by this Court of the ruling below.

B. THE STATUTE MUST BE MEASURED AGAINST THE STRICT SCRUTINY STANDARD RATHER THAN THE SECOND CIRCUIT'S WATERED DOWN ANALYSIS; AS SUCH, THE STATUTE MUST FALL.

As recognized by the Second Circuit, speech in the form of works such as *Wiseguy* is entitled to the highest degree of First Amendment protection. (10a-13a, 19a). Commentary on crime, and its implications for the criminal justice system and the quality of life in our society, is vital and deserving of presentation to the American public from as many perspectives as possible. It is through such educative process that manifold works dealing with various aspects of crime add to our

storehouse of knowledge, thereby promoting better societal decision-making.[5] *Associated Press* v. *United States*, 326 U.S. 1, 20 (1944) ("the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, . . . a free press is a condition of a free society"). This Court has "required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content." *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981).

Moreover, it is axiomatic that a statute which "single[s] out the press for special treatment," *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983), almost certainly will not withstand First Amendment scrutiny. The court below recognized that the statute at issue does precisely that. (13a). The especial burdens placed upon book publishers and other media representatives—in attempting to comply with the vagaries of the statutory scheme, in determining whether to publish at all in the face of the law, and, if so, how to tailor a book's contents so as to keep a project viable—cannot be justified and most surely give rise to the inference "that the goal of the regulation is not unrelated to suppression of expression," a goal which is "presumptively unconstitutional." *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. at 585.

In addition, this Court has recognized the particularly crucial importance of the public's participation in society's prosecution of criminals. In *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982), the Court fiercely protected the public's access to criminal trials in the face of the admittedly compelling state concerns of protecting young victims of sex crimes and encouraging such victims to come forward and testify truthfully. In a similar vein, public access to thoughts, impressions and accounts of crimes conveyed by persons con-

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5 The broad reach of the statute to encompass works that have little to do with crime overall merely underscores why strict scrutiny is necessary—for in practice the statute interferes with all manner of serious writings, provided solely they touch on a criminal episode.

victed by our judicial system is necessary " 'to protect the free discussion of governmental affairs' " "[which underlies] the First Amendment right of access to criminal trials." 457 U.S. at 604, *quoting Mills* v. *Alabama*, 384 U.S. 214, 218 (1966).

By prohibiting payments to accused or convicted persons due under media contracts covering expression of "thoughts, feelings, opinions or emotions" regarding a crime or containing a "reenactment" of a crime, the New York statute can be applied only after the speaker has been identified and the content of the work has been reviewed. As such, the crippling shortcoming of this scheme is that it interferes with long established First Amendment rights: it is both a content-based restriction which is unconstitutional on its face, *see Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("[a]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content' " (quoting *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972)));[6] and a statute which exacts an impermissible and disproportionate burden on publishers and authors wishing to create and publish works beneficial to society, *see Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. at 585 (1983) (a statute imposing a tax only upon the press, which differed in application among members of the press based upon content-related characteristics, was held unconstitutional and found to present a threat of press censorship) and *Meyer* v. *Grant*, 486 U.S. 414 (1988) (a statute barring speakers from making payments they deemed necessary to make their speech effective was held unconstitutional as an unjustifiable burden on the right to speak).[7]

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6 *See also Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974) (a Florida statute creating a right of reply in newspapers was held unconstitutional and found to "exact[ ] a penalty on the basis of the content of a newspaper").

7 *See also First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue").

Recognizing such, the court below concluded that the statute must fall unless it withstood strict scrutiny. To this point, its reasoning was unassailable. Regrettably, in purporting to apply the strict scrutiny standard, it did little more than defer to the facial language of the statute, thus failing to place the statute under the skeptical analytical light that its speech encumbrances require. The proper analysis involves a determination as to whether the regulation is "*necessary* to serve a *compelling* state interest and that is *narrowly drawn* to achieve that end." *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37, 45 (1983) [emphasis added]. Under this analysis, the New York statute is clearly unconstitutional.

1. The State's Asserted Interests Do Not Outweigh The Damages Caused By The Loss Of Constitutionally Protected First Amendment Rights.

Where, as here, the government's conduct inevitably, even if unintentionally, deters the exercise of First Amendment rights, the interest advanced by the State must be paramount, one of vital importance and the gain to the subordinating interest provided by the means must *outweigh* the incurred loss of protected rights. *Buckley* v. *Valeo*, 424 U.S. 1, 65-66 (1976). Even assuming *arguendo* that the publication of a given work would have the effect of compensating a criminal for collaborating on the creation of a work dealing in some manner with his crime while victims remain uncompensated, the transcending inquiry is whether preventing this result is a State interest so compelling or paramount as to outweigh the resulting contraction of writings about crime and loss to society of works deserving broad readership.

The State has failed utterly to make its case for so drastic a curtailment of First Amendment expression. In holding to the contrary, the Second Circuit severely compromised the very essence of the strict scrutiny analysis. Indeed, as we next dis-

cuss, a strict scrutiny analysis was applied by the Second Circuit in name only.

2. The Statute Is Not Sufficiently Tailored To "Fit" Or "Meet" The State's Asserted Interests.

The flaw in the Second Circuit's reasoning was pointed out in Judge Newman's dissent. By defining the State's interest in terms of the statute's stated scope, the majority reached the circular conclusion that the scope of the statute was precisely tailored to the state's objective. The majority concluded that in pursuit of its goal of compensating crime victims, New York may escrow payments to criminals which flowed from books, movies, and articles written about their crimes because such practice would indeed benefit crime victims, the ultimate goal of the statute. This analysis "eliminate[d] the entire [strict scrutiny] inquiry concerning the validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech". (20a-21a). Instead, and in essence, the Second Circuit appears to have been satisfied to find a rational relationship existing between the statute's ends and means.

Even if it were assumed that the State's interest in compensating crime victims is of paramount interest, the regulation cannot be upheld because "even the most legitimate goal may not be advanced in a constitutionally impermissible manner." *Carey* v. *Brown*, 447 U.S. 455, 464-5 (1980). While it is claimed that the statute is aimed not at the suppression of expression, but at compensating crime victims, the means chosen for achieving this goal suggest otherwise.

Without regard to other sources of income or other assets that may be held by a convicted person, and which in many cases may be sufficient to compensate a crime victim, the statute reaches specifically and exclusively for speech related profits. To the extent that the statute seeks to assure the availability of assets for the benefit of crime victims, there is no justification for singling out assets derived solely from one

limited form of activity—proceeds from media contracts for works purporting to reenact the crime or reflect thoughts, opinions, feelings or emotions about a crime.

The legislature could just as easily have enacted an even-handed statute directed at securing *all* of a convicted criminal's assets, from whatever source, without undue focus upon contractual relationships involving members of the media and the resulting unique burdens placed upon the media in complying with the administrative burdens and censorial consequences of the statute. Singling out the media for special treatment under the law cannot be justified where the State's purpose could be accomplished without discrimination against the media and the resulting loss of First Amendment rights. *See Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. at 586. A legislature has not "narrowly tailored" a law to its State's goals when that law unnecessarily and unjustifiably discriminates against speech of a specific content.

Similarly, to the extent that the State's objective is to avoid the exploitation of crimes until crime victims are compensated, the statute is ill-fitted to its purpose. As Judge Newman noted, a person who acquires fame as a result of being convicted can enjoy enhanced success and profit from writing or contributing to books, films, and the like on a wide variety of topics other than the crime, without being required to relinquish under the statute the monies received. (19a).

While the Second Circuit found the "fit" between the statute and the State's objective to be sufficiently precise, the analysis used to arrive at that conclusion has been repeatedly rejected when assessing statutory schemes under the strict scrutiny standard. If the Second Circuit's mode of analysis were to pass muster, the statutes challenged in this Court's landmark cases would all similarly have been upheld. For example, the statutes imposing taxes on certain publications in *Minneapolis Star*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) would have been held valid if the State need only have shown that

the statutes achieved the State's objective of raising revenue from the publications within their coverage. Instead, this Court closely examined the distinctions made by the statutes at issue in those cases to determine whether the resulting discriminations were justified and outweighed by more important goals, and whether there was any less restrictive means of accomplishing such goals that would avoid the abridgment of First Amendment rights.[8]

In *Carey* v. *Brown*, 447 U.S. 455, 465 (1980), this Court rejected the argument that a statute was valid simply because the non-labor picketing in residential neighborhoods it prohibited could be viewed as satisfying the objective of protecting residential privacy. Applying the proper, more searching analysis, this Court found the State's interest insufficient to justify the burdens it placed on the First Amendment. "[N]othing in the content-based labor—nonlabor distinction has any bearing whatsoever on privacy. . . . Standing alone, then, the State's asserted interest in promoting privacy of the home is not sufficient to save the statute." *Id.*

Meyer v. *Grant*, 486 U.S. 414 (1988), involved a statutory scheme prohibiting the use of paid petition circulators. Following the logic inherent in the Second Circuit's analysis, the Court in that case could have found that the State's interests in protecting the integrity of the initiative process was satisfied by the statutory scheme. However, this Court properly rejected such argument as insufficient, holding that it is not enough that the scheme *satisfies* the State's goals; the strict scrutiny standard instead requires that the resulting burden

8 *See also Rutan* v. *Republican Party of Illinois*, ____ U.S. ____, 110 S. Ct. 2729, 2737 (1990) (the State's content-based conduct relating to patronage dismissals could not withstand the rigors of strict scrutiny despite the State's asserted interests in securing effective employees and employees who will loyally implement its policies and preserve the democratic process, since such interests can be satisfied with equally effective means that are less intrusive on the First Amendment).

on protected expression of any statute be shown to be *necessary* in order to meet the state's concerns. *Id.* at 426.[9]

There can be no tolerance for a watering down of the safeguards erected by this Court, designed expressly to protect the exercise of First Amendment rights. The careless (and ultimately callous) approach of the Second Circuit majority toward the protection of such rights requires correction by this Court. Any different result invites a stifling of the free and robust debate upon which this country was founded.

C. THE EXISTENCE OF OTHER, MORE EFFECTIVE MEANS OF ACHIEVING THE STATE'S ASSERTED INTEREST, WHICH DO NOT RESULT IN THE INFRINGEMENT OF FIRST AMENDMENT RIGHTS, PRECLUDES A FINDING THAT THE STATUTE IS NECESSARY FOR THE ACHIEVEMENT OF THE STATE'S GOALS.

There already exist comprehensive procedures under New York's Civil Procedure Law and Rules adequate to assure that any assets of certain accused or convicted criminals will be available to satisfy any money judgments obtained against them under certain circumstances. New York penal laws authorize sentencing judges to order restitution in every case. N.Y. Penal Law § 60.27 (McKinney 1987). That such procedures exist has been conceded by the State Crime Victims Board itself in a recent decision. *See In the Matter of the Petition of Bernhard Hugo Goetz*, State of New York Crime Victims Board, March 17, 1988. Such existing laws could, moreover, be modified if it were determined that victims were not being adequately compensated. Nothing would prohibit a victim restitution statute that would attach all of a criminal's assets and income from all sources. It is therefore difficult, if

9 *See also Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607-609 (1982) [emphasis in original] ("as compelling as that interest [(safeguarding the physical and psychological well-being of a minor)] is, it does not justify a *mandatory* closure rule" for "[t]hat interest could be served just as well by requiring the trial court to determine on a case by case basis whether" closure is necessary).

not impossible, for the State to persuade this Court that Section 632-a, which targets only income from protected speech related to criminal activity, provides a uniquely important remedy. It is simply not the case.

Indeed, unlike Son of Sam statutes, the general restitution statutes are capable of effective application without the severe deterrent effect on speech. By specifically setting out to prevent criminals from profiting from their crimes, media-targeted statutes have the direct and immediate effect of inhibiting expression which results in fewer books about crime. General restitution statutes, on the other hand, are not likely to specifically discourage such media related activity.

It is noteworthy that the statute at issue has produced just five escrow accounts in its eleven years of operation, three of which involved the same criminal. Joint Appendix at A37-A38. The compensatory effect of the statute thus far has been extremely limited, in contrast to its severe speech-inhibiting effects. In addition, the statute conceivably has harmed victims themselves as many books that would have been published but for this statute would have produced significant royalties available to victims under New York's source-and-content-neutral restitution scheme.

CONCLUSION

By allowing the State of New York effectively to curtail the creation of works dealing with crime, and otherwise to influence the manner in which such works may be written and their contents, New York's Son of Sam statute strikes at the heart of publishing autonomy guaranteed by the First and Fourteenth Amendments. Affirmance of the Second Circuit's ruling would mean that speech of substantial social value will never reach the public. This result will be brought about, moreover, without any showing of a compelling need for such curtailment, or demonstration that such a need could not have been served with a measure far less burdensome to speech.

The censorial effects of a statute such as Section 632-a are heightened when that statute applies, as it does here, to the very center of this country's publishing industry, and where the practices of many other states follow the pattern established by the New York law.

AAP respectfully urges this Court to reverse the ruling of the Second Circuit and hold that Section 632-a *et seq.* of the New York Executive Law, N.Y. Exec. L. § 632-a *et seq.*, is an unconstitutional exercise of State authority. Such a ruling, by eliminating an undue and unnecessary burden on free speech, will permit unfettered publishing activities in a now-clouded area to proceed.

Respectfully submitted,

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AMICUS APPENDIX

An Annotated Bibliography of Published Works by American Prisoners and Ex-prisoners, 1798-1988

Introduction

The bibliography included in the 1978 edition was the first attempt to catalog the works published by American prisoners and ex-prisoners in the nineteenth and twentieth centuries. It made no claim to be exhaustive, since finding and identifying literature by convicts is a formidable bibliographic task. In the ensuing four years, so many new books by American prisoners were published and so many overlooked works came to light that the publisher of the 1982 edition of *Prison Literature in America* decided to print the greatly expanded bibliography separately as an independent tool for further research. The present edition incorporates that separately bound work, together with revisions and addenda, including books published since 1981.

The bibliography does draw on some previous efforts. For the earlier literature, there was Augustus F. Kuhlman's groundbreaking *A Guide to Material on Crime and Criminal Justice* (1929), with corrections and author index by Dorothy Campbell Culver (Montclair, NJ: Patterson Smith, 1969), which includes some listings of literature by convicts and criminals, mostly personal narratives. This does not attempt to distinguish between authentic autobiographies and sensationalized narratives palmed off as "confessions" by notorious criminals. Dorothy Campbell Culver's updates of Kuhlman, *Bibliography of Crime and Criminal Justice, 1927-1931* and *1932-1937* (Montclair, N.J.: Patterson Smith, 1969), add some newer works, but literature by convicts is not indexed in her successor volumes covering the 1938 to 1965 period. *Barred Visions: A Bibliography of Materials by Prisoners*, compiled by Rhea Joyce Rubin (Chicago Public Library, 1974, with mimeographed updates in 1975), lists quite a few English-language materials published since 1950, including British writings and foreign works translated into English. The *Fortune News*, a journal published by the Fortune Society, is an excellent source for current publications.

Rudolf Engelbarts's *Books in Stir: A Bibliographic Essay . . .* (Metuchen, N.J.: Scarecrow Press, 1972) lists and discusses a few dozen works. Herman K. Spector's *San Quentiniana: Books Published by Officials and Inmates of San Quentin* (San Quentin, 1953) gives some biographical and bibliographic facts on eleven San Quentin author-inmates. The June-July 1974 issue of *Margins: A Review of Little Mags and Small Press Books* contains a thirty-page section on prison writing, edited by Joseph Bruchac, with very helpful bibliographic information not available elsewhere. *Imprisoned in America; Prison Communications: 1776 to Attica*, edited by Cynthia Owen Philip (New York: Harper & Row, 1973), is a valuable source of information about letters by American prisoners, a form I have not included unless the letters were published as a book. In 1979 appeared Daniel Suvak's far-reaching *Memoirs of American Prisons: An Annotated Bibliography* (Metuchen, N.J.: Scarecrow Press), which incorporates descriptions of prison life by officials, reporters, teachers, chaplains, etc., and includes a separate section on military prisoners (with a valuable list of narratives about World War II "relocation centers" as well as extensive records of works by prisoners of war), a category I do not cover. Suvak does not attempt to include literature by convicts that does not deal directly with their prison experience.

I have not tried to cover oral materials, such as songs, whether or not recorded and transcribed, so some of the main forms of prisoners' literary art are not represented in the bibliography. For help in this area, consult my notes to Chapters 3 and 6 of the current edition.

Another exclusion is the journals published within prisons. For an introduction to these materials, see Russell N. Baird's *The Penal Press* (Evanston, Ill.: Northwestern University Press, 1967) and Paul Dickson's "The Inmate Press," *Nation* (April 27, 1974, pp. 527-30).

After the original bibliography had gone to press, Dr. Robert Pierce, who teaches literature in the Texas Department of Corrections, very generously exchanged his current bibliographic efforts with mine. I have incorporated a few

items from his two unpublished bibliographies, "A Preliminary Check List of Criminal Justice Books in the Sam Houston University Library Published before 1900" and "A Humanities and Criminal Justice Bibliography"; these items are indicated parenthetically as "Pierce. Not examined." Some of the new entries in the current bibliography have been suggested by James Brown, Joseph Bruchac, Karen Franklin, Flora Higgins, Bill Keith, Max MacNamee, Edward Sagarin, and Jeff Youdleman. Jane Morgan Franklin has helped in more ways than I can possibly acknowledge.

An asterisk (*) preceding an entry indicates that this work is discussed in the present edition of *Prison Literature in America: The Victim as Criminal and Artist*. Most of these indicated works are also discussed in the first edition, *The Victim as Criminal and Artist: Literature from the American Prison*.

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